IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Plaintiff-Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Commissioner of Finance and Taxation,
Defendant-Appellee.

Appeal from the Supreme Court of the State of Tennessee,
Case No. 14.
Davidson Equity.

MOTION

To Strike Plea of Estoppel.

An appeal has heretofore been granted appellant on a petition which presents the following issue:

The appellant's 1950 excise tax year ended on December 31, 1950. The tax payable on "net earnings" for that tax year was not due until July 1, 1951. By Act effective on February 1, 1951, thirty-one days after the end of the tax year, but five months before tax payment date, July 1, 1951, and at the first session of the Tennessee Legislature

convening after the end of the tax year, it was provided that taxes paid the United States and foreign governments could not be deducted in determining "net earnings," the base of the Tennessee excise tax. This resulted in an increase of appellant's tax. The issue as presented by the petition was: Could an act retrospective to this extent be enacted without violating due process of law and equal protection under the Fourteenth Amendment?

The appellant filed a motion to dismiss or affirm in which it was contended that upon a proper construction of the opinion of the Supreme Court of Tennessee, the issue was not as stated in the petition but was this: At the time of the amendment of the Excise Tax Act in February, 1951, the tax year still had five months to run, so that the amendment was only retroactive as to the seven months of the twelve months period which had expired at the time of the enactment of the amendment, Chapter 6, on February 1, 1951.

The only controversy between appellant and appellee with respect to the issue is whether the opinion of the Supreme Court of Tennessee fixes the tax year as ending December 31, 1950 or July 1st, 1951. If the opinion fixes the tax year as ending July 1, 1951, then the issue is as stated by appellee. If the opinion fixes the tax year as ending December 31, 1950, then the issue is as stated by appellant.

The opinion of this court in Welch v. Henry, 305 U. S. 134, requires that the appeal be dismissed regardless of who is right with respect to the issue presented by the appeal.

If the appellant is right about the issue presented by the appeal, the opinion in the case of **Welch v. Henry**, supra, plainly requires that the appeal be dismissed since it is

plain that under appellant's statement of the issue the excise tax was amended at the first legislative opportunity to do so following the tax year.[1] In other words, the amendment was made on February 1, 1951, thirty-one days after the close of the tax year of 1950. This plainly brings the amendment within the rule laid down in the **Welch v. Henry** case to the effect:

> "And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, Cooper v. United States, 280 U. S. 409, 74 L. ed. 516, 50 S. Ct. 164, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment."
>
> **Welch v. Henry**, 305 U. S. 134, 146-150.

However, the plea of estoppel tendered by appellant is not well taken and should be stricken for the following reasons:

In substance, the plea is: That a petition for clarification of the opinion of the Supreme Court of Tennessee, in the form of a petition to rehear, was filed in the Supreme Court of Tennessee. That a reply was filed thereto by appellee in which the appellee construed the opinion of the Supreme Court of Tennessee to the same effect as the petition to rehear. That without awaiting the further opinion of the Supreme Court on the matter the petition was voluntarily dismissed by the petitioner-appellant, without the entry of any decree or order other than an order that the

1 "Sec. 8. When legislature to meet; when governor to be inaugurated. —The first session of the general assembly shall commence on the first Monday in October, one thousand eight hundred and seventy-one, at which time the term of service of the members shall commence, and expire on the first Tuesday of November, one thousand eight hundred and seventy-two; at which session the governor elected on the second Tuesday in November, one thousand eight hundred and seventy, shall be inaugurated; and, forever thereafter, the general assembly shall meet on the first Monday in January, next ensuing the election, at which session thereof the governor shall be inaugurated."

Article 2, Sec. 8, Constitution of Tennessee.

petition and reply be dismissed on the motion of appellant and **stricken from the record.** This was done and the same do not constitute a part of the record, and are not before this Court as a part thereof. The reply which was filed is, however, set forth in the affidavit. The petition to rehear, which should be before the Court if the reply is to be considered for any purpose, is not before the Court.

If the plea is to be treated as a plea of estoppel of record, it is not good since there is no record to support it. In the absence of the petition, the plea may not be sustained as a plea of an estoppel of record and should not be considered for this purpose.

The plea, if treated as a plea of estoppel *in pais*, or an equitable estoppel, would not be good because of the following reasons:

First, the dismissal of the petition to rehear was purely voluntary and not at the suggestion of the appellee.

Second, the reply filed suggested that "the Commissioner as stated **presently** construes the opinion as validating Regulation 6, etc." [2] This makes it clear that this was not the fixed view of the Commissioner but the view was subject to alteration as circumstances might require.

Third, the conclusions in the reply were conclusions directed to the Supreme Court of Tennessee, not the petitioner, as to how a legal opinion should be construed, and were not conclusions of fact or representations of fact conducive to the action taken by appellant in dismissing its petition.

Fourth, upon a reading of the opinion of the Supreme Court of Tennessee it is so plain that that court considered the tax year to be a period of twelve months immediately preceding July 1st, that it is more reasonable to believe

---

2 Reply to petition to rehear. Emphasis supplied.

that the petitioner dismissed its petition for fear that it would secure a pronouncement from the court which would prevent the arrangement then being agreed to by the Commissioner than for any other reason. In other words, the motivating reason for the dismissal of the petition was fear of the consequences thereof rather than otherwise.

Fifth, there was no decree entered to the effect now contended for by appellant, but the Supreme Court of Tennessee was content simply to dismiss the petition to rehear and the reply thereto, and to order the same stricken from the record.

Sixth, the State of Tennessee, as a sovereign state, cannot be estopped with respect to its tax collections by the opinion of one of its officials contrary to the requirement of the statute law of the state. In other words, the question always is, in case of the expression of an opinion by a state official as to the meaning of a statute or an opinion of the Supreme Court of the state: Is the opinion correct upon a consideration of the statute or the opinion of the court? The state is not estopped thereby.[3]

Accordingly, appellee submits that the plea of estoppel is not well taken and the same should be stricken. Or, in any event, the appeal should be dismissed or affirmed as in the opinion of this Court the record may require.

The controversy between the appellant and appellee as to the proper construction of the opinion of the Supreme Court of Tennessee does not involve a Federal question and can be resolved by these parties in litigation in the State courts. The situation of the appellant could not be improved by securing a further clarification of the opinion of the Supreme Court of Tennessee at this time, because even

[3] United States v. City and County of San Francisco, 310 U. S. 16, 84 L. ed. 1050;
R. J. Reynolds Tobacco Co. v. Carson, 187 Tenn. 157;
Gilman Paint & Varnish Co. v. Carson, 190 Tenn. 256

if the Supreme Court of Tennessee were to clarify its opinion so as to satisfy the appellant that the issue is as appellant states it, it would still be necessary to dismiss the appeal, if the opinion of this Honorable Court in **Welch v. Henry**, supra, is still to be followed, which we ever pray will be the case.

Respectfully submitted,

ROY H. BEELER,
Attorney General of State of Tennessee,

ALLISON B. HUMPHREYS,
Solicitor General,

Counsel for Appellee.

No. 108

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Com'r. of Finance and Taxation,
Appellee.

BRIEF

For Appellant Opposing Motion to Strike Plea of Estoppel.

CHAS. C. MOORE,
1324 Hamilton Bank Building,
Chattanooga, Tennessee,
Counsel for Appellant, Penn-Dixie Cement Corporation.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PENN-DIXIE CEMENT CORPORATION,
Appellant,

vs.

J. M. DICKINSON, Successor in Office of John F. Kizer,
Com'r. of Finance and Taxation,
Appellee.

BRIEF

For Appellant Opposing Motion to Strike Plea of Estoppel.

The motion of appellee to strike brief for appellant invoking estoppel is based on the principle that a public officer may not be estopped from performing an official duty imposed upon him by law.

Appellant in reply says there is no law imposing upon appellee the official duty of taking one position in the court below by which he obtains withdrawal of appellant's petition for clarification of the opinion of that Court, and then, on appeal, take the opposite position in this Court.

After averring in his answer to appellant's petition for clarification that the Supreme Court of Tennessee in deciding this case had overruled the argument made in his behalf in that court that the tax sued for herein was paid for the current tax year expiring July 1st, 1951, and had validated his regulation 6 that the law imposed the tax for the fiscal year expiring before that date, as a valid construction of the law of Tennessee, appellee takes the position in this Court "that the tax period paid for, or the tax year paid by the July 1st payment was the twelve months period immediately preceding July 1st" (Appellee's brief, page 4).

Appellee's motion to strike states:

> "The appellant's 1950 excise tax year ended December 31st, 1950. The tax payable on net earnings for that tax year was not due until July 1, 1951" (Appellee's motion, page 1).

The two statements quoted above are not consistent.

In the last statement appellee recedes from the position taken in his first brief filed in this Court.

In his last statement he agrees with appellant that the tax sued for herein was paid for the privilege exercised during the fiscal year 1950, which ended before Ch. 6, Acts of 1951, in question here, was enacted, but argues in effect that because the Tennessee law did not require this privilege tax to be paid in advance, the legislature of Tennessee could constitutionally impose this $21,152.03 of additional tax one month after the privilege had been exercised, but five months before the tax for that privilege was due.

However, at the bottom of page 4, he reverts to the position taken in his first brief.

These inconsistencies require consideration of the estoppel invoked.

In support of the motion to strike appellee cites the case of United States v. San Francisco, 310 U. S. 16, 84 L. Ed. 1050.

That case was this. The City of San Francisco had been granted by an Act of Congress the right to take water from the Yosemite National Park and distribute same to domestic and other users in the City. The Act of Congress expressly prohibited the City from selling the water to a private corporation for resale to users of water, and directed the Attorney General of the United States to take proceedings in the name of the United States if the condition was not complied with upon request of the Secretary of the Interior.

For a period of years the City sold this water to a private corporation for resale to consumers.

Finally the Secretary of the Interior requested the City to discontinue violation of the Act of Congress, which it failed to do.

In defense of the Government's suit for injunction the City insisted that the Government was estopped by the acquiescence of the Commissioner of the Interior for a period of years, which estoppel this Court denied.

Clearly, that case has no application here.

Adversary brief also cites R. J. Reynolds Tobacco Co. v. Carson, 187 Tenn. 157, and Gilman Paint & Varnish Co. v. Carson, 190 Tenn. 256, in support.

The first cited case holds that the State is not estopped by an agreement of the Commissioner of Finance and Taxation to waive the payment of taxes imposed by law upon a taxpayer unless the taxpayer can show that injury resulted.

In the second case, the Court held that "the State is not bound by an erroneous opinion of a subordinate employee

of non-tax liability, when, in fact, there is such liability" and since no prejudice resulted.

Neither of these cases support appellee's contention here.

In Davis v. Wakelee, 156 U. S. 681, 39 L. Ed. 579, the fifth headnote is:

> "Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter simply, because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken."

The above holding is supported by the text of 19 Am. Jur., page 704, and the many cases cited in the footnote thereto. These authorities establish the rule that a litigant will not be permitted to change his position in a legal proceeding to the prejudice of his adversary, as appellee sought to do here.

On page 4 of the brief appellee insists that his answer to the petition for clarification in the Court below should not be considered for any purpose because the petition which was answered is not in the record.

Since appellee refused to have the petition for clarification and answer thereto made a part of the record on this appeal, he may not now complain that the petition is not in the record.

Respectfully submitted,

CHAS. C. MOORE,
1324 Hamilton Bank Building,
Chattanooga, Tennessee,
Counsel for Appellant, Penn-Dixie
Cement Corporation.